Department of Law Monthly Report
September, 2007

Generally Speaking

COMINGS and GOINGS

Please welcome back to the department, **AAG Glenn Gustafson**. AAG Gustafson will be working in the RAPA Section.

The RAPA section bid farewell to two staff members this month. **Cristina Klein**, the first section staff economist, left to pursue a private sector opportunity in alternative energy. Veteran engineering analyst, **Tim McConnell**, retired from state service.

The Labor and State Affairs Section said a sad goodbye to **AAG Susan Daniels** who transferred to the Collections and Support Section.

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The Bethel DAO welcomed **ADA Chris Carpeneti**, who started with the offices on September 24.

CIVIL DIVISION

Child Protection

New CINA cases based upon allegations in OCS petitions:

OCS assumed custody of two children when one child was found sitting outside her home unable to get in. The father could not be located. When he was located, he admitted he had resumed the use of narcotics and was in need of treatment. The mother is deceased and the department is attempting to locate relative placements.

Naknek law enforcement responded to a domestic violence disturbance which led to the arrest of a woman for violation of probation for alcohol consumption. Because the mother failed to make arrangements for a place to stay for her children while she was incarcerated, OCS assumed custody.

The department received notice that a woman was walking down the Old Seward Highway with her three-year-old daughter. The woman was so intoxicated she could not pronounce her daughter's name or remember her daughter's birthday. The woman was arrested for child neglect. Upon further investigation, it was discovered the child had unexplained bruises and cuts on her body. The woman has another child whose whereabouts are unknown. The father's whereabouts are also unknown. OCS assumed custody.

The Bethel Police Department responded to a call of domestic violence. They found parents of four small children highly intoxicated. The parents were uncooperative and the children were scared and

dirty. The family has a history with OCS; OCS assumed emergency custody.

In Juneau, OCS assumed emergency custody of two children. The oldest child is diabetic and the mother had been failing to follow through with necessary medical treatment. As a result, the child's health was seriously threatened. OCS placed both children in a foster home.

OCS took two children into emergency OCS custody when their mother was arrested in Kenai for felony vehicle theft. The mother has no family in Alaska to care for the children. Upon further investigation, bruising was discovered on the children and they disclosed they had had very little food in the past day. It appeared the mother may have a mental health problem. The father lives out of state.

OCS assumed emergency custody of a two-year-old boy when his mother refused assistance from OCS to get into a domestic violence shelter. The mother had been involved in a domestic violence incident with her boyfriend a couple of days earlier. OCS had been working with the mother for over a year, attempting to help the mother create a safe home environment. The father's whereabouts are unknown and he has not had contact with his child.

In Juneau, OCS filed a petition to assume custody of a thirteen-year-old girl. The department had been working with the family for over two years in attempts to control mental health, substance abuse and domestic violence issues. Several safety plans designed to keep the family intact were put in place but they were unsuccessful. OCS felt the child should be removed from the home to protect her safety.

A morbidly obese sixteen-year-old was admitted to the hospital when she began to cough up blood. The child's excessive weight was threatening her life. The hospital and OCS worked with the mother to develop a healthy living plan for her daughter. The mother did not follow through with the plan and continued to feed the child potato chips and candy, even at the hospital. After continued missed doctor's appointments, OCS assumed emergency custody. The father's whereabouts are unknown.

In Homer, an infant girl was taken into custody at birth. The family has five other children in OCS custody and a history with OCS dating back 15 years. The concerns over the years include excessive discipline of the children, domestic violence and pervasive chronic neglect including environmental, educational and medical neglect. The parents also have mental health issues.

Numerous children across the state were taken into custody as a result of serious risk of harm as a result of their parents' substance abuse and domestic violence.

Other

AAG Roger Rom attended the CASA Conference on September 21st in Anchorage.

Commercial and Fair Business

Alaska Joins Multistate Settlement With Maker of Implantable Defibrillators

Alaska and 35 other states reached a settlement with Guidant Corporation regarding unfair trade practices in the advertising and sale of a type of Implantable Cardioverter Defibrillator (ICD). Guidant discovered that the device could short-circuit, and thus fail to deliver a lifesaving jolt of electricity to the heart when needed. In 2005, Guidant modified the device to address this problem, but it continued selling unmodified devices without disclosures to doctors or patients. Under the stipulated judgment, Guidant must implement ICD safety programs, report public safety information about the devices, extend a warranty program for consumers, and pay $16,750,000 to the states. Alaska's portion of the payment is $350,000.

Nursing Board Revokes License of Public Health Nurse

On September 19 the Board of Nursing ("Board") adopted the proposed decision of Administrative Law Judge ("ALJ") Mark Handley and revoked the registered nurse license of Donna Hamshar, based on her conduct as a public health nurse at the Juneau Public Health Center ("Center"). As described in the accusation filed on July 13, 2006 by the Division of Corporations, Business and Professional Licensing ("Division"), Hamshar's caseload at the center encompassed both caring for clients with communicable diseases and those with social issues (especially relating to families and care of children), as well as assisting families who might have problems navigating the health care system.

Her clients included immigrants (particularly those with limited English speaking skills), people with limited resources, and people at risk for health problems, none of whom could be expected to initiate contact, or to follow through with health related activities for which they were unfamiliar. However, based on a report generated by the division's expert, in 20 separate cases, there were no records generated by Hamshar after clients were assigned to her. In 19 other cases, there was inadequate follow-up with clients and in another 6 cases, there was delayed follow-up. The division alleged numerous violations of AS 08.68.270(5) (intentionally or negligently engaging in conduct that results in a significant risk to the health or safety of a client or injury to a client) and AS 08.68.270(7) (unprofessional conduct).

Hamshar, who had resigned from the center while it was investigating her conduct, hired an attorney who filed a notice of defense and requested a hearing. On October 23, 2006, at a pre-hearing conference with the ALJ, Hamshar's attorney announced that he was withdrawing as her counsel because he had been unable to contact her. On November 9, 2006, Hamshar failed to appear for a pre-hearing conference with the ALJ. Rather than schedule a hearing, the ALJ set a schedule for filing briefing on dispositive motions. On December 8, 2006, the division timely filed a motion for summary adjudication, which included 54 exhibits.

Hamshar, whose license lapsed on November 30, never responded to the motion and on August 16, 2007, the ALJ granted the motion and issued his proposed decision. The ALJ found, based on the evidence submitted by the division, that Hamshar engaged in unprofessional conduct, which placed the health, safety and welfare of her clients and others at risk. Specifically, he found that Hamshar's unprofessional lapses put her clients (and the public) at an additional risk for serious consequences, including active tuberculosis, salmonella and sexually transmitted diseases. The ALJ concluded Hamshar's license should be revoked because her continued practice of nursing would present a significant health risk to the public. AAG Robert Auth represented the division in this proceeding.

Environmental

Oil Spill Cleanup Barge Compliance Order. In September, the Alaska Department of Environmental Conservation (DEC) and three operators of crude oil tankers calling at the Valdez Marine Terminal entered into a compliance order by consent to resolve a shortfall in oil recovery barge capacity required as part of the operators' oil discharge prevention and contingency plans.

Under the compliance order by consent, Alaska Tanker Co., LLC, Polar Tankers, Inc. and SeaRiver Maritime, Inc., chartered an additional oil storage barge and tug and outfitted the barge with additional oil skimmers and equipment. The storage capacity shortfall was discovered by the companies in February of this year as part of efforts to improve the design of the existing barges' piping systems used during an oil response. The storage shortfall was the result of reduced load-line storage capacities of the barges when they are equipped with skimmers and other oil response equipment.

The shortfall was immediately reported to DEC and the companies agreed to a series of short-term response and prevention mitigation measures until the additional barge and tug could be chartered, transported from Seattle, outfitted in Valdez and receive its certificate of inspection from the U.S. Coast Guard. The tug and barge was brought to Alaska on an extremely expedited basis. It arrived in Valdez in August and was determined by DEC to be equipped and outfitted as required by the compliance order by consent on August 17, 2007.

As part of the compliance order by consent, the operators paid a civil assessment of $50,000 to the state to reimburse the state's costs associated with the compliance order by consent and verifying the storage capacity of the barges. The state determined that a larger civil assessment was not warranted because the operators had not incurred economic savings as a result of the storage shortfall and no harm to the environmental occurred as a result of the alleged violations. The cost of the companies' immediate compliance actions in 2007 in chartering and outfitting a fourth barge and an additional tug greatly exceed the economic savings of the avoided storage capacity costs. Senior AAG Breck Tostevin represented DEC in the enforcement case.

Wrangell Institute Cleanup. U.S. District Court Judge Sedwick signed a consent decree between the State of Alaska, United States of America, Cook Inlet Region, Inc. and the City of Wrangell providing for the completion of environmental cleanup at the Wrangell Institute site. The Wrangell Institute site is a former BIA school and is now owned by the City of Wrangell. Under the consent decree, the United States will provide $2.35 million to the State of Alaska to reimburse it for its past and future costs cleaning up petroleum contamination at the site from the old heating oil tanks and pipelines at the property. Work at the site by the state's contractors began this summer and the City of Wrangell will be performing long-term water monitoring at the site. Senior AAG Breck Tostevin represented the state in connection with the negotiation of the consent decree.

Lakosh v. DEC. On September 14 Judge Morse dismissed Tom Lakosh's consolidated administrative appeals relating to the Department of Environmental Conservation contingency plan approval decisions for the 2002 Prince William Sound Tanker contingency plans, and the 2003 Valdez Marine Terminal plan. Mr. Lakosh had filed a qualified notice of withdrawal in July indicating he would like to withdraw the appeals, yet reserve the right to later bring constitutional claims related to the matters withdrawn. Judge Morse denied this request and dismissed the appeals with prejudice.

Human Services

Litigation Update

Section Chief Stacie Kraly received a favorable decision from Judge Burgess in federal district court in *E.H. v. DHSS, et al.* This was a Part C appeal under the IDEA. AAG Kraly had moved for dismissal in the administrative hearing under a subject matter theory and prevailed. The plaintiffs waited over two years to appeal, which AAG Kraly said was too long. Judge Burgess agreed and granted her motion to dismiss.

The section received two new Medicaid complaints. *Keirsten Smart v. DHSS, DSDS*, is based upon Medicaid audits. The other case is *Washington v. SOA, DHSS, and DSDS*, which seeks a class action regarding the state's decision to pay for respite services for a paid primary caregiver. The underlying legal issues were addressed in an administrative appeal (McGrew) which the section may appeal.

Medicaid

Subrogation/Liens

During the month of September, the subrogation team collected a total of $56,217.87 in third-party liability recoveries because of 17 case resolutions. Presently, the subrogation team has an inventory of 707 open matters.

On September 23-26, AAG Twomey attended the 2007 National Third-party Liability/Coordination of Benefits Conference. This conference presented an opportunity to share "best practices" among state Medicaid agencies in the area of casualty claims and estate recovery.

Other

APS/API

AAG Beth Russo continues to be busy with filings and motions generated by attorney Jim Gottstein on behalf of his client Bill Bigley. The two most recent filings were not well received by the court. An order for sanctions was recommended in one case, and the other was rejected as not meeting the civil rules (with leave to re-file). Despite the court's recent efforts to rein in these filings, they keep coming.

AAGs Beth Russo and Libby Bakalar conducted half-day training for all adult protective services workers in Anchorage. This was a first-time event for the all involved and was well received.

Division of Juvenile Justice

AAG Robin Fowler successfully argued a motion in superior court to have an *in camera* review of confidential Division of Juvenile Justice records and postpone records depositions. This was a very good result because the civil division came into the process late and was arguing motions and orders that had been filed and or ruled on months ago. AAG Fowler's presentation on the motion for the *in camera* review was very well thought out and accepted by the superior court. The client was very pleased with the outcome.

Public Health

AAG Libby Bakalar presented on public health law at a statewide meeting for pandemic planning.

Labor and State Affairs

Court System

On September 21, the Ninth Circuit Court of Appeals issued the decision in *Alaska Right to Life & Miller v. Feldman*, reversing the district court's decision that a judicial canon violated the First Amendment. The Ninth Circuit held that plaintiffs' lacked a justiciable case or controversy: the constitutional challenge should not have been entertained because the facts were not adequately developed. Right to Life had surveyed judicial candidates for retention in the 2002 election on their views on subjects of interest to the organization. Several judges indicated a reluctance to respond because of the judicial canons, and Right to Life and former Commissioner of Administration Mike Miller filed suit two years later against the members of the Commission on Judicial Conduct seeking declaratory and injunctive relief.

Their claim was that two judicial canons' unconstitutionally chilled the judges' pre-election speech under the First Amendment. Judge Beistline agreed, concluding that Judicial Canon 5A3(d)—prohibiting judges from making promises, pledges or commitments re their conduct in judicial office—violated the judges' right to speak before a retention election. The judge rejected a challenge to the "recusal" canon (JC 3E(1)), which requires a judge to remove him or herself from a matter in which the judge's impartiality can reasonably be questioned. The basis of the appeal was, first, that JC 5A3(d) satisfied the standard applied under the First Amendment and, second, that the case was not justiciable because the plaintiffs lacked standing and because the case was not ripe.

The Ninth Circuit panel did not review the constitutional issue, focusing instead on the threshold issues of standing and ripeness. Although the court recited the test for standing under Article III of the U.S. Constitution, it applied the test for ripeness. The panel examined whether the issues were fit for judicial review and whether it would cause a hardship to

withhold review. It concluded that the issues were unfit for review because the record did not show that the Commission on Judicial Conduct had even contemplated the issue; the commission had not indicated that it would issue a complaint and no judge had asked for an advisory opinion on the issue.

The panel noted that the executive director had cautioned judges about responding to the survey, but found that the letter could be considered, at most, informal guidance. The panel also relied upon the Alaska Supreme Court's commentary to JC 5A3(d), which the panel found to indicate "a strong likelihood that the Alaska Supreme Court would construe the canon to avoid the constitutional concerns" that had been addressed in other federal court cases, most notably the U.S. Supreme Court case of *White v. Republican Party of Minnesota*. That case invalidated Minnesota's more restrictive canon prohibiting candidates for judicial office from "announcing" their views on legal issues.

Although the case was decided on procedural grounds, it is an important victory because the judicial canons addressing election speech have been faring badly in a number of cases that the Right to Life and related organizations have filed in courts around the country. In other cases, the courts have found standing and concluded that prohibitions on speech during elections for judicial office were too restrictive to survive scrutiny under the First Amendment. Section Chief Jan DeYoung represented the commissioners.

Education

On Sept 14 a hearing officer stayed the hearing scheduled for the week of September 14 in the Anchorage School District's administrative claim for additional intensive education services funds. The reason for the delay was to permit consideration of the district's petition to the superior court to review evidentiary rulings made by the hearing officer. AAGs Sarah Felix and Neil Slotnick are representing the Department of Education and Early Development.

General Services

On September 14, the Alaska Supreme Court issued its decision in *State of Alaska, Department of Administration v. Bachner Company, Inc.* The state had petitioned the Court to review a superior court decision reversing an administrative award to Bachner Company and Bowers Investments of bid costs for irregularities in the bid process for a long-term lease for office space in Fairbanks. At the administrative level, after finding several defects in the bid process, the Commissioner of Administration weighed the factors in AS 36.30.585(b) and concluded that they tipped in favor of an award of full bid preparation costs. He declined to cancel the lease or rescore the proposals, as the bid protester requested.

The superior court on appeal disagreed, concluding that an award of bid preparation costs was an insufficient remedy for the defects in the bid process. He found that the commissioner failed to give proper weight to the harm to the public and to protecting the integrity of the procurement process when applying AS 36.30.585(b). The superior court remanded the matter to the commissioner for cancellation, rescoring, or re-bidding the contract as the appropriate remedy, even though years had passed since the lease was awarded to the winning bidder.

The Supreme Court reversed the superior court. Overall, the Supreme Court based its decision on the standard of review of an administrative decision and reinstated the agency decision. The Supreme Court found that the hearing officer's decision to limit the remedy to an award of full bid preparation costs was supported by the facts and had a reasonable basis in law. Further, the Court concluded that the hearing officer correctly applied the factors in AS 36.30.585(b). It further concluded that no one factor should be given more weight than others to determine an appropriate remedy. AAG Margie Vandor represented the state.

Legislation

On August 31, 2007, the Alaska Supreme Court issued its opinion in *Anchorage Baptist Temple v. Coonrod*, which followed its March order announcing its determination to reverse the trial court's denial of intervention status to three religious organizations. The Court stated that it did not question the state's ability to represent its citizens and their associations but reversed the lower court's denial of intervention because the churches had significant financial and other interests to advance that might not be covered by the state. The churches therefore satisfied the test applied to determine intervention of right under the civil rules. The state supported intervention. AAG Richard Postma handled the appeal for the state.

Occupational Safety and Health

The Fairbanks Mental Health Center accepted Alaska Occupational Safety and Health's charge of a general duty clause violation following the death of an employee by a patient. AAG Larry McKinstry represented the state.

Legislation and Regulations

During September, the Legislation and Regulations Section spent a busy month preparing for the second special session of the Alaska State Legislature. The section also edited and legally approved for filing the following regulations projects: 1. Department of Fish and Game (sport fishing services and guides; inspection of logbooks); 2. State Board of Education and Early Development (general standards for certification of teachers; statewide assessment program; "growth model" for calculating adequate yearly progress; retention and preservation of electronic records); 3. Alaska Commission on Postsecondary Education (consolidated student loans, student loans in default, appeal procedures for medical cancellations, and authorizations for postsecondary institutions); 4. State Board of Registration for Architects, Engineers, and Land Surveyors (continuing education for professional architects, engineers, and landscape architects); 5. Board of Certified Direct-Entry Midwives (prenatal care, extra partum care, and medications); 6. State Physical Therapy and Occupational Therapy Board (examinations for licensure; foreign-trained physical therapy and occupational therapy application requirements, licensure requirements, and code of ethics).

Natural Resources

University Lands Litigation

AAG Anne Nelson filed the state's summary judgment reply memorandum in the university lands litigation, completing briefing in the Juneau Superior Court. Plaintiffs, environmental advocacy groups SEACC and TCS, have challenged legislation conveying approximately 260,000 acres of state land to the corpus of the University of Alaska's endowment trust on the grounds that it creates an unconstitutional dedicated fund. Oral argument has been requested but not yet scheduled.

Matanuska Maid Dairy

AAG Tina Otto is continuing to work with the Board of Agriculture and Conservation as well as the Department of Natural Resources regarding the disposal of property currently being used by Matanuska Maid Dairy.

LCC V. DNR. Juneau Superior Court Judge Collins awarded $1,000 in attorney's fees to the state as the prevailing party in *LCC v. DNR*. Earthjustice, council for a number of public interest groups in this litigation, filed a substantial opposition to the state's fee motion supported by affidavits from many of the litigants. The appellants in this case included Southeast Alaska Conservation Council, Juneau Audubon Society, and Lynn Canal Conservation, Inc. The fee award is notable as it is one of the first judicial decisions regarding public litigants since the

Alaska Supreme Court decision in *State v. Native Village of Nunapitchuk*. *In Nunapitchuk*, the Court upheld the validity of HB 145, which eliminated the public interest litigant exception to Alaska's fee shifting rule.

Pasternak v. State, Commercial Fisheries Entry Commission. On September 7 the section received a decision from the Alaska Supreme Court in *Pasternak v. State, Commercial Fisheries Entry Commission*, affirming CFEC's decision to deny Pasternak a limited entry permit for the Northern Southeast Inside (NSEI) sablefish (black cod) fishery. The Court rejected Pasternak's argument that the maximum number (73) for the fishery should be increased, finding it to be foreclosed by the Court's earlier decision in *Simpson v. State, CFEC*. In particularly helpful language, the Court also held that it need not address Pasternak's argument that the highest number of units of gear in any one of the four years preceding limitation actually was 74 because, due to his point level of 51, he could not show that he was prejudiced by the determination that the maximum number was 73. AAG John Baker represented the state in this appeal.

Copeland v. State, Commercial Fisheries Entry Commission. Another favorable Supreme Court decision was received in *Copeland v. State, Commercial Fisheries Entry Commission* on September 21. Copeland sought a Prince William Sound purse seine permit. The court upheld CFEC's denial of permit, finding that Copeland did not prove that "unavoidable circumstances" prevented him from participating in the fishery in 1970 and adopting the superior court's decision denying him income dependence points. AAG Laura Bottger, of the Opinions, Appeals and Ethics section, represented CFEC in this appeal.

Norval Nelson, Jr. v. State, Commercial Fisheries Entry Commission. On September 12 AAG John Baker filed the state's brief in *Norval Nelson, Jr. v. State, Commercial Fisheries Entry Commission*. This is another challenge to a denial of a limited entry permit for the NSEI sablefish fishery. In this appeal, Nelson claims that his failure to hold necessary licenses during 1975 and 1977 was due to "misadvice" by CFEC staff, and that "extraordinary circumstances" prevented him from demonstrating a necessary level of participation in the fishery in 1977. In the superior court, Nelson had also challenged the maximum number for the fishery, but he abandoned that argument on appeal, following the Alaska Supreme Court's decision in *Simpson*.

Estate of Peter Phillips, Jr. v. Commercial Fisheries Entry Commission. This is the second superior court appeal of CFEC's denial of Phillips' application for a Chignik purse seine limited entry permit. Phillips died in 1990, and his estate is pursuing the application. Phillips, who was an Aleut from Perryville, leased vessels from the Alaska Packer's cannery in Chignik in 1963 through 1966, and operated them as a gear license holder. In 1966, Phillips got in a heated dispute with the cannery boss over some work that Phillips wanted done on the boat he was leasing. Phillips was not able to lease a boat from the cannery again, and he worked as a crew member on boats from 1967 through 1972. His estate now claims that the reason he couldn't lease a vessel after 1966 was because of racial discrimination, and therefore he is entitled to additional points because he didn't operate as a gear license holder due to "unavoidable circumstances." He fails to address the fact that after the vessel was taken away from him, it was leased to another Alaska Native from Perryville.

The CFEC decided Phillips did not meet his burden of proving that he didn't operate due to unavoidable circumstances and denied his application with only 14 of 20 points. The state's brief is due in October.

Eastwood v. State, Commercial Fisheries Entry Commission. On September 20, AAG Vanessa Lamantia participated in an oral argument before Judge Hopwood in the Juneau Superior Court in this appeal of a CFEC decision, denying the appellant's claim for skipper participation points for 1982 for the Northern Southeast Inside sablefish fishery. The state argued that because Eastwood failed to meet the harvest threshold to be

awarded points for that season, failed to prove his circumstances qualified as "extraordinary circumstances," and failed to prove he could reasonably have claimed the points but for his extraordinary circumstances under CFEC regulations, the CFEC properly denied his claim and properly classified his permit application at 60 points. The state also argued Eastwood's request to remand the case to allow for the introduction of additional evidence is not warranted because he had ample opportunity to supplement the record, but simply failed to prove his claim.

Kenai River Federal Customary and Traditional Use Determination For Resident Species Repealed

On September 13 the Federal Subsistence Board acted on a request for reconsideration filed by the state in June, and repealed the board's previous customary and traditional (C&T) determination for Ninilchik to resident fish in the Kenai River drainage. However, the board retained the C&T determination for Ninilchik to salmon in the Kenai River area, including the Russian River. The board declined to respond further to the section's other pending requests for reconsideration regarding existing C&T determinations for Hope and Cooper Landing, treating them as final determinations.

Tier II Subsistence Preliminary Injunction

In a challenge to recently-adopted regulations governing scoring of Tier II subsistence hunting permit applications for Unit 13 moose and caribou hunts, Superior Court Judge Jack Smith granted a preliminary injunction requested by the Ahtna Tene Nene' Subsistence Committee and other long-time users precluding the state from enforcing several of the new rules. The court ordered the Department of Fish and Game to rescore all of the roughly 7,000 applications under different criteria, preventing application of several regulations that, collectively, reduced an applicant's score to zero if that applicant's household had an income higher than double the federal poverty guideline level for a household of four.

The court also prohibited the state from enforcing a rule that permit winners could not hunt that same species elsewhere in the state during the same regulatory year. The Unit 13 hunts are the most contentious hunts in Alaska, driving much of the subsistence controversy between rural and urban Alaska, and the board was concerned that the vast majority of successful permittees each year are long-time urban Alaska residents who are, essentially, grandfathered into a system that, to many, appears to be monopolistic and poorly related, if at all, to actual subsistence needs. Further motions will be necessary to determine the final outcome in the case. The state is represented by AAG Kevin Saxby.

Climate Change and Endangered Species Issues Not Unique to Alaska

At the request of the Alaska Department of Fish and Game, AAG Steven Daugherty attended a conference of the Association of Fish and Wildlife Agencies from September 17-20. The conference focused largely on climate change and endangered species issues. During the conference, it was learned that Alaska's experience with the proposed listing of the polar bear based entirely on unproven climate change and population modeling will not be unique for long. Many states are already facing the prospect of numerous potential Endangered Species Act listings of currently healthy populations based on climate change modeling which predicts significant climate changes likely to cause the extinction of species or to result in the loss of species within historic range. During the conference it was also learned that the Center for Biological Diversity has recently filed a petition for listing over 200 species based on climate change predictions.

Opinions, Appeals and Ethics

During September, the section issued a non-confidential opinion addressing conflicts of interest for the Board of Education, five confidential advisory opinions, and responded to numerous informal requests for advice. The section also

reviewed and granted four requests for waivers of private attorney conflicts.

The section also continued providing ethics training to members of various executive branch departments, boards, and commissions. In addition, the section developed drafts of web-based ethics training and a manual for designated ethics supervisors. They also assisted the Alaska Public Offices Commission in interpreting the 2007 amendments to the public officials' financial disclosure requirements, which were part of the ethics bill that Governor Palin signed in July.

Appeals/Litigation

***AKPIRG v. State* (Case No. S-12341).** This month the Supreme Court issued a unanimous opinion holding that the Alaska Workers' Compensation Appeals Commission is a constitutionally created quasi-judicial agency under Art III, § 22 of the Alaska Constitution (Executive Branch) and not, as AKPIRG asserted, an "executive court" unconstitutionally formed within the executive branch in violation of Article IV (Judiciary). The legislature did not violate the separation of powers either in creating the commission within the executive branch or in withdrawing intermediate appellate jurisdiction over workers' compensation cases from the superior court.

The decision, which is a total victory for the state, was authored by Chief Justice Fabe. The Court also held that the legislature did not have to enact the statute creating the commission by a super majority. Setting the jurisdiction of the superior court is an issue of substantive law committed to the legislature under Art. IV, § 1, not a change to procedural rules committed to the supreme court under Art. IV, § 15 (and subject to change only by a super majority vote of the legislature).

The Court closely examined the functions of the appeals commission and concluded that its limited jurisdiction, its inability to enforce its own decisions, its statutorily limited discretion to award compensation and the availability of judicial review established that the commission was not improperly delegated judicial power reserved solely for the courts. The Court also found no defect with the commission acting as a second level of agency review before issuing the final agency decision.

However, the Court was concerned that the last sentence of AS 23.30.008(a) – providing that the decisions of the commission have "the force of legal precedent" – could be subject to an interpretation that appeals commission decisions are binding on the courts. This interpretation (if adopted) would unconstitutionally intrude upon the judicial function under the separation of powers doctrine. Therefore, applying the rule that statutes should be read to be constitutional if possible, the Court adopted a limited interpretation of §. 008(a) and held that appeals commission decisions are binding only on the appeals commission and the workers' compensation board, not the courts. The state had advocated for this interpretation.

Addressing AKPIRG's claim that the new statute violated due process because trials *de novo* would no longer be available in the superior court, the Supreme Court held that it has inherent authority to grant *de novo* review if due process requires it in a particular case. The Court stated that, if a trial *de novo* were required in a particular case, the matter would be referred to the superior court as the court of general trial jurisdiction. This appeal was handled by AAGs Laura Bottger and Paul Lyle.

***Walker v. State* (Case No. S12203).** The Alaska Supreme Court heard oral argument this month in *Walker v. State*. The issue in this case is whether the State of Alaska had a duty to maintain, for the safety of the public, a dirt access road that ran from a homestead through BLM property to the Knik River Road. The homestead owner put a cable across the road to prevent theft from his property, and three teenagers on an ATV hit the cable while driving down the road at night. The jury allocated fault among a number of defendants, but the trial court dismissed the state from the case before trial,

finding that the state did not own the road or have authority over it, and that the state had no duty to keep the road safe. The plaintiffs appealed the summary judgment, arguing that factual disputes exist about the extent of the state's duty, and that these disputes should be decided by a jury. This appeal was handled by AAG Joanne Grace.

State v. Sullivan **(Case Number S-12157/12277).** The Alaska Supreme Court issued an opinion, based on two petitions for review. This appeal arises out of a tort case in which a mother and child sued the Office of Children's Services (OCS) and social worker Lynn Eldridge for alleged conduct during a prior child-in-need-of-aid (CINA) case. In the CINA case, the trial court denied OCS's petition to terminate parental rights, ordering OCS to reunify the child with her mother. Based on the findings entered in that case, the mother and child sued OCS and Eldridge under a variety of state tort claims and several § 1983 claims.

During preliminary motions, the superior court concluded that Eldridge was not entitled to qualified immunity for the § 1983 claims and that Eldridge was collaterally estopped from challenging any of the factual findings made by the judge in the CINA case. Eldridge filed a petition for review on each of these orders. The Supreme Court reversed both orders and remanded for further proceedings. The events leading up to these orders are discussed in more detail below.

Eldridge filed a motion to dismiss, arguing in part that she was entitled to absolute immunity in relation to the § 1983 claims. In that same motion, she sought dismissal of the state tort law claims based on an immunity defense. In its order denying the motion to dismiss, the superior court applied the state tort law immunity defense to both the state and federal claims. Eldridge petitioned for review, arguing that federal law should have been applied to the § 1983 claims, not state law, which involves a different legal test. Agreeing with Eldridge that the defense of qualified immunity for state tort law claims and for § 1983 claims involve two distinct tests, the Supreme Court concluded that superior court erred in determining that Eldridge was not entitled to qualified immunity for the § 1983 claims.

Rather than consider on appeal whether Eldridge was entitled to qualified immunity for the § 1983 claims (as the respondents had requested), the Supreme Court agreed with Eldridge that the issue should be remanded back to the superior court for further litigation. The Supreme Court explained that "claims of federal qualified immunity must be analyzed within the context of the specific facts of the case" because "the inquiry into whether a reasonable officer would know that his conduct was unlawful is a wholly objective inquiry that should be 'undertaken in light of the specific factual circumstances of the case.'" Because Eldridge had not been able to submit relevant documentary evidence and develop the facts of the case below, the Supreme Court found that it would be premature for it to apply the federal test for qualified immunity on appeal. As such, it vacated the superior court's order and remanded for further proceedings.

The respondents filed a motion below seeking to preclude Eldridge from litigating any of the 47 factual findings entered by the judge at the conclusion of the termination of parental rights trial in the separate CINA case. Eldridge opposed, arguing that she could not be collaterally estopped from litigating these facts because she was not a party to or in privity with a party to the CINA case. The superior court granted the motion, concluding that as a material witness in the CINA case, who sat at counsel table throughout the proceeding with an AAG, Eldridge was in privity with OCS. Eldridge petitioned for review.

In reversing the superior court's decision, the Supreme Court noted that the "majority of courts maintain that government employees, in their individual capacities, are generally not in privity with the government and are not bound by adverse determinations against the government. This is because the interests, incentives, and immediate goals of a government employee in his or her individual capacity will most often be dissimilar from those of the government or even

from those of that same employee in his or her official capacity. As a result, cases brought by or against the government or its employees in their official capacities will not usually provide a proper forum or even the slightest opportunity for a government employee to protect his or her own personal interests. And as a matter of sound policy, this is how it should be. For when the government enters the courthouse in order to prosecute criminal conduct or protect a child in need of aid, it should not be distracted from its purpose by the personal interests of its employees."

Applying the general rule to this case, the Supreme Court concluded that Eldridge was not in privity with OCS during the CINA proceedings, had not had a full and fair opportunity to litigate the issues of fact, and could not be precluded from re-litigating such issues now. As such, it reversed the superior court's order and remanded for further proceedings. AAG Megan Webb handled the case on appeal; AAG Gene Gustafson handled the case below.

Zander P. v. State, Department of Health & Social Services, Office of Children's Services **(Case Number S-12066).** The Alaska Supreme Court issued an unpublished decision affirming the termination of parental rights of a father to his two sons. The father argued that the trial court erred in concluding that the boys were children in need of aid under AS 47.10.011(1) (abandonment) because the father was incarcerated and conduct during a period of incarceration may not be used as evidence of abandonment. The Supreme Court rejected this argument, noting that the Office of Children's Services (OCS) is not limited to terminating parental rights under subsection (2) (incarceration) simply because a parent is incarcerated. Instead, the trial court may consider a parent's willful conduct (*i.e.*, behaving violently, attending counseling, making efforts at communicating with child) during incarceration in relation to any of the statutory requirements for terminating parental rights. The Supreme Court then considered whether there was sufficient evidence to support the abandonment finding. Based on the fact that the father had only limited contact with his children (before, during, and after his periods of incarceration) and refused to cooperate with OCS or work a case plan, the Supreme Court concluded that the father evidenced a "total lack of effort to maintain and foster a relationship with his children," warranting a finding of abandonment.

The father also challenged the reasonable efforts finding, arguing that although OCS provided a case plan for him shortly before he was re-incarcerated, it failed to contact the Department of Corrections to identify and recommend programs available to him while in prison. The Supreme Court rejected this argument as well. It noted that when OCS presented the father with a case plan, he refused to comply with the requirements, terminated the meeting, and failed to contact OCS after that. The Supreme Court noted, "Under different circumstances, the state's lack of efforts towards helping an inmate work his case plan may be critical in evaluating the reasonableness of the state's efforts. Here, however, [the father's] past interactions with the state overwhelmingly show a complete disregard for completing any sort of case plan or treatment necessary to maintain his role as a parent." As such, the trial court's finding was not erroneous. AAG Megan Webb handled the case on appeal; AAG Dave Bauer handled the case below.

Sheldon v. City of Ambler **(Case number S-12298).** AAG Mary Lundquist argued the *Sheldon v. City of Ambler* case before the Alaska Supreme Court this month. This case is an appeal from a grant of summary judgment on an excessive force claim against the City of Ambler. The state, as amicus curiae, is requesting the Court to overrule *Samaniego v. City of Kodiak*, 2 P.3d 78 (Alaska 2000). *Samaniego* is this Court's leading case on the qualified immunity defense to state law excessive force claims. *Samaniego* relied on the then-current Ninth Circuit analysis in *Katz v. United States*, which was reversed by the U.S. Supreme Court the year after *Samaniego* was decided. The state is requesting that *Samaniego* be overruled because it followed now-abandoned federal case law.

Regulatory Affairs and Public Advocacy (RAPA)

Recent Filing

RCA/U-07-112, BUC rate case comments. Bethel Utilities Corp. (BUC) filed a tariff revision, TA200-43, seeking an across-the-board rate increase of 9.81% for electrical service. This is the utility's first rate case since Docket U-03-11 was resolved by stipulation with the AG/public advocate in 2004. Napakiak Ircinraq Power Company, an all-requirements wholesale customer of BUC, filed responsive comments that challenged the utility's cost allocations.
On August 27, 2007 the AG/RAPA filed comments recommending that the commission suspend the tariff filing for further investigation of the reasonableness of the proposed rates. The AG comments specifically identified six areas that warrant further investigation, including the discontinuation of waste heat sales and proposed pro forma wage increases. On September 7, the commission suspended the filing, granted an interim and refundable rate increase, and invited AG participation in the proceeding. RAPA will respond timely by the October 10 intervention deadline.

New Case

RCA/U-07-108, GVEA transmission tariff. Golden Valley Electric Association (GVEA, in Fairbanks) filed TA175-13 proposing to tariff common transmission service (a "wheeling" rate) and agreements for firm point-to-point service. This is a matter of first impression for the commission. Homer Electric Association, AIDEA, and the AG/RAPA filed comments indicating that the rate issues required careful analysis, particularly regarding impacts on the interconnected railbelt energy grid and intertie.

On August 31, 2007 the RCA suspended the utility filing and invited AG/RAPA participation in the proceeding. RAPA filed a notice of election to participate on September 11. The Commission Hearing Officer scheduled a mandatory settlement conference for November 8th.

Torts and Workers' Compensation

State superior court summary judgment. Superior Court Judge Stowers granted summary judgment in favor of the state troopers in a case where a criminal defendant, acquitted from charges of sexual assault of a minor in his criminal case, sued the investigating trooper for malicious prosecution, negligent claim investigation, and intentional infliction of emotional distress. Under AS 09.50.253, the state substituted as the defendant. The judge granted summary judgment based on the state's immunity under AS 09.50.250, and also based upon the court's finding that the trooper's conduct was appropriate as a matter of law. This matter was defended by AAG Dana Burke.

Federal district court dismissal. A lawsuit for damages based upon 42 U.S.C. § 1983 (due process claim) filed against a state DNR employee was dismissed by U.S. District Judge Burgess on summary judgment. Plaintiff's claims arose under a state construction contract, on which he served as the general contractor. Plaintiff had been unsuccessful in both his administrative claim relating to his default on the contract as well as on his appeals to the superior court and the Alaska Supreme Court. The court found that his claims arose out of his contractual claims, and are not afforded Fourteenth amendment due process protection under 42 U.S.C. § 1983 because state law provided an adequate remedy and sufficient due process. The matter was briefed by AAG Dave Floerchinger prior to his retirement from state service.

Transportation

Supreme Court Approves of Court Orders to Control Repetitive Litigation

The Alaska Supreme Court issued an opinion in one of Daniel DeNardo's cases against Judge Rindner. Substantively, the Court upheld the superior court's award of attorney's fees to Judge Rindner, which was the issue on appeal. The

Court declined to issue an order controlling Mr. DeNardo's filing of future litigation because the issue had not been raised in the superior court.

However, the Court spent several pages favorably discussing the rationale for orders controlling vexatious litigants so long as those orders are "raised initially in the superior court in order to allow all parties the proper due process which must include a hearing, adequate justification in the record, and a narrowly tailored order." This comports with Judge Rindner's request, during oral argument, that if the Court was unwilling to issue an order in the instant case it nonetheless provide guidance to the superior courts and rules committee so they can appropriately address the issue. Section Chief Jim Cantor represented Judge Rindner.

Prisoner Transportation Lawsuit Resolved

The state settled a lawsuit with the Municipality of Anchorage over the transportation of Municipal prisoners between jail and the courthouse. The municipality claimed the state was contractually required to provide this service by a 1999 agreement relating to the housing of municipal prisoners. In the settlement, the state agreed to transport the municipality's prisoners in the future, while the municipality agreed to waive its damage claim for past years, and to continue guarding the prisoners while in the courthouse. AAG Jeff Stark represented the state.

CRIMINAL DIVISION

Anchorage DAO

September was another busy month in Anchorage with 54 grand juries and 7 trials. Anchorage also welcomed five new attorneys and two new staff members.

Michelle Linehan's murder trial has stolen all the Anchorage headlines, but our own ADA John Skidmore continued his trial onslaught, convicting Donald Jewell of felony murder during a drug robbery gone bad. A trial involving drug dealer/user witnesses is tough enough, but ADA Skidmore had to suffer two lengthy mid-trial continuances because the defense attorney's back started bothering her. Persistence and patience won out and the jury deliberated 90 minutes before convicting the out of custody Jewell.

ADA Taylor Winston prevailed in a sexual assault trial involving third time offender Arnold Kittick. With an intoxicated victim who no longer remembered the events by the time of trial, the case was made stronger by the testimony of several good Samaritans who ran to the aid of the screaming victim, including soon to be judge Pat McKay.

After a contentious jury trial, ADA Taylor also saw DUI assault defendant Donovan King get sentenced to 18 years with 5 suspended after driving headlong into oncoming traffic. After a near fatal crash, the defendant fled on foot but was caught by an off-duty corrections officer.

ADA Rob Henderson succeeded in getting Nicholas Blackwell sentenced to 20 years with 6 suspended after he shot into the car of a rival with an AR-15, striking it four times, injuring the passenger. The MIW sentence was consecutive to a lengthy federal sentence for being a felon in possession.

Bethel DAO

The last vacant attorney position for the office was filled this month by ADA Christian Carpeneti. After attending trial training in Homer, ADA Carpeneti hit the ground running. He is already covering various hearings solo every day and has district court trials scheduled in the second week of October.

ADAs Thomas Jamgochian, Patty Burley and David Buettner all attended the Homer training as well as ADA Carpeneti. They all returned with high energy and very positive reports about the training; and all are eager to put the training to use at trial.

During that training period the office was manned by DA Joanis and ADA A.J. Barkis, the drug and bootleg prosecutor. Fortunately, ADAs Regan Williams and Gregg Olson of the Rural Prosecution Unit came out to help cover court in front of Bethel's eight judges and magistrates.

Juneau DAO

The Juneau DAO secured an indictment of Sauhna Cranston on September 21st for misconduct involving a controlled substance in the second degree and misconduct involving a controlled substance in the third degree for importing controlled substances to Juneau on September 15th. Ms. Cranston was found in possession of 65 hydrocodone pills and 409 grams (almost a pound) of methamphetamine. Ms. Cranston has a history of trafficking in illegal substances in Washington State.
Annie Smallwood was indicted on September 28th for assault in the first degree for stabbing her neighbor on September 19th. The victim's girlfriend told police the victim had been speaking to another male about some money that had gone missing. Ms. Smallwood then entered the apartment and initially threatened the victim by holding a knife to his throat before she stabbed him twice, once in the upper left chest, causing his lung to collapse, and once in the leg.

The end of September marked the transfer of Petersburg and Kake files to the Juneau DAO and the Wrangell files to the Sitka DAO.

Kenai DAO

The highlight of this month in Kenai was the visit of Attorney General Colberg along with Deputy Attorney General Rick Svobodny. The two not only met people at the Kenai DA's Office, they also made separate visits to meet with the two current superior court judges, the director of the women's shelter, and the heads of the Kenai Police Department, Soldotna Police Department, and the Alaska State Troopers.

Progress is being made both in and outside the Kenai Courthouse. Construction of three new courtrooms has really gotten under way, although the outside of the building looks like a war zone. Chief Administrative Judge Morgan Christen visited the site, met with members of the Kenai Bar Association as well as met privately with the DAO. She said that Kenai was her number one priority, which was very encouraging.

The Seward courtroom is also undergoing a complete renovation, and hearings are currently being held in the city council chambers.

Further news on the judicial front includes the installation of Sharon Illsley as the new District Court Judge.

Sex offenses seemed to be the theme for trials this month. The DAO had a felony failure to register as a sex offender trial. The office hit the wall on one issue: what changing one's residence means. Under the statute AS 12.63.010: "If a sex offender or child kidnapper changes residence after having registered under (a) of this section, the sex offender or child kidnapper shall provide written notice of the change by the next working day following the change to the Alaska state trooper post or municipal police department located nearest to the new residence or, if the residence change is out of state, to the central registry." However, under the accompanying administrative code 13 AAC 09.040, Notice of change of residence; mailing address, "(b) For the purposes of AS 12.63.010, an offender is considered to have changed residence on the date that the offender leaves the residence without intending to return to continue living there, or the date that the offender has been away from the residence for 30 consecutive days, whichever occurs first."

The jury, wanting desperately to convict, could not get past the fact that the defendant had left clothes and a toothbrush behind "intending to return". They spoke at length with the prosecutor afterward, expressing their concern at what they saw as a loophole in the registration system.

The prosecutors also had a sexual assault against a minor one and sexual assault one in the first degree trial in which the victim at the time of the offense was two-and-one-half-years-old. She is four now, and the jury cried when she was introduced to them. The defendant was the mother's boyfriend and since mom was the only means of the support, he babysat while she went to work. Along with sexual assault injuries, the child suffered massive head trauma and loss of hair, as well as numerous bruises to her body from the physical assault. The jury convicted on all counts and everyone involved was very vested in the case. The alternates came back the next day for the verdicts. The defendant then stipulated to the aggravators, which was a relief because the jury appeared to be really exhausted. You could hear the courage of their convictions when they were polled and each very proudly affirmed that these were their verdicts.

Kodiak DAO

The Kodiak office experienced a steady influx of work during September.

Early in the month a Kodiak man was indicted after he entered the apartment of his former fiancé and attacked both her and another man. The male victim lost a tooth and sustained facial fractures. The grand jury indicted for multiple felony charges.

Mid-month, a Maine man came to the attention of the Kodiak police after they were called to a fight in the downtown area. The defendant was stopped driving away from the fight after witnesses identified him. He was arrested for driving while intoxicated, driving while license suspended, and giving false information. When checking records out of Maine, it was determined that he had pending felony prosecutions in Maine and fled to avoid jail in January, 2007. The defendant, who has multiple felony convictions in Maine, was subsequently indicted by the Kodiak grand jury for failure to register as a sex offender when records revealed that he had also failed to register upon arriving in Alaska. At arraignment after the prosecutor reviewed a lengthy criminal history in Maine, the defendant asked for a low bail saying "I've never been in trouble in Alaska".

Two young Kodiak men were arrested and charged with criminal mischief and multiple counts of misdemeanor assault after a fight between two juvenile girls at a local park. Following the fight which a group of people had gathered to watch, emotions erupted while departing from the park. The two young men, during comments made in the aftermath, damaged a car by striking the hood and violently opening the driver's door causing it to hit the front fender. They were also charged with hitting or threatening several occupants in the car.

Palmer DAO

A Palmer jury convicted 22-year-old Aric Tolen of sexual assault in the first degree, two counts of assault in the second degree and two counts of assault in the third degree. The case stemmed from an incident in January where Tolen, after drinking, held his girlfriend at knife point, cut her, strangled her and sexually assaulted her in the presence of two young children. Tolen had two prior felony convictions and faces 40-99 years in prison. ADA Rachel Gernat prosecuted this case for the state.

Jacob Butler was found guilty of driving while under the influence after a jury trial in Glennallen early this month. The case involved evidence of drinking after driving, and criminalist Jeannie Swartz was called as an expert witness to conduct a retrograde extrapolation of defendant's breath alcohol level. The trial prosecutor was ADA Jarom Bangerter.

SAVE THE DATE

November 27-30 -	NAAG Winter Meeting Park City, Utah
December 20 -	Juneau Holiday Party